Supreme Court, U.S.
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No. 00-53

IN THE

Supreme Court of the United States

BEVERLY TUCKER,

Petitioner,

v.

ROBERT C. WOLTER, Attorney, DEBRA J. GREER, Attorney, LAW FIRM OF WOOD, BOYKIN & WOLTER, a Professional Corporation, and MICHAEL DAVID BOUDLOCHE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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Respondents, Robert C. Wolter, Attorney, Debra J. Greer, Attorney, and Law Firm of Wood, Boykin & Wolter, a Professional Corporation, (hereinafter collectively referred to as the "Law Firm"), respectfully request that the Petition for Writ of Certiorari filed by Beverly Tucker be denied.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in the Courts Below

This appeal arises from the denial of Beverly Tucker's motion, brought pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, to vacate a summary judgment order entered by the Bankruptcy Court in favor of the Law Firm as to Ms. Tucker's claims against it. These claims were asserted in a negligence lawsuit that was removed from state court and became an adversary proceeding in the main Chapter 7 bankruptcy case of Ms. Tucker's husband, Danis R. Tucker. Beverly Tucker was not a joint debtor in her husband's bankruptcy.

The United States District Court for the Southern District of Texas, Corpus Christi Division, affirmed the decision of the Bankruptcy Court, which denied the Rule 60(b) relief sought by Ms. Tucker. Pet. App. B.[1] The United States Court of Appeals for the Fifth Circuit upheld the decision of the District Court (Pet. App. A), and also subsequently denied Ms. Tucker's Petition for Rehearing. Pet. App. C.

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1. Reference is made to the documents contained in the Appendix to the Petition for Writ of Certiorari.

B. Statement of Facts

Danis R. Tucker, d/b/a Ralphs Food Co., d/b/a Ralphs Foods Co., d/b/a Laredo Spice Co., d/b/a Pepper Tree Foods, d/b/a Nevada Converting Company, d/b/a Silver State Bookkeeping Services, d/b/a Fifth Avenue Fashions, d/b/a B G Tucker (hereinafter Danis R. Tucker d/b/a Ralphs Food Co.), filed a Chapter 11 bankruptcy petition on July 7, 1994. Beverly Tucker did not join her husband in this filing.[2] The case was converted to a proceeding under Chapter 7 on February 21, 1995. The Law Firm represented Danis R. Tucker in his bankruptcy case from the date of filing of the Chapter 11 petition through October 18, 1994, at which time the Bankruptcy Court permitted the Law Firm to withdraw from representation.

On July 8, 1996, Beverly Tucker filed suit against the Law Firm in the 156th Judicial District Court of San Patricio County, Texas, alleging attorney negligence and violations of the Texas Deceptive Trade Practices Act on the part of the Law Firm in connection with its bankruptcy representation of her husband. On August 7, 1996, the Law Firm removed the state court action to Bankruptcy Court on the basis that the causes of action alleged were property of the estate of Danis R. Tucker.

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2. Ms. Tucker asserts in her Statement of Facts that none of the opinions of the lower courts mention that she was not a party to the bankruptcy proceeding. That she was not a joint debtor in her husband's bankruptcy proceeding has always been included by the Law Firm in its statement of facts to the lower courts. There can be no dispute, however, that upon removal of her state court lawsuit to bankruptcy court, Ms. Tucker was a party to an adversary proceeding in bankruptcy court and actively participated in the summary judgment proceedings resulting in the order that she later sought to vacate.

Beverly Tucker filed a Motion to Remand, to which the Law Firm filed a Response, and a hearing was held by the Bankruptcy Court on October 7, 1996. At the hearing, the Bankruptcy Court determined that a prerequisite to the decision whether to remand was a determination of whether Beverly Tucker might be precluded as a matter of law by the doctrines of res judicata or collateral estoppel from asserting her claims against the Law Firm, due to the previous approval of the Law Firm's fee application in the main bankruptcy case. The Bankruptcy Court instructed the Law Firm to file a motion for summary judgment addressing this question.

The Law Firm filed its motion for summary judgment and Beverly Tucker filed her responses to the motion. A hearing was held on November 25, 1996 and on March 12, 1997, the Bankruptcy Court's Memorandum Opinion and Order granting the Law Firm's motion was entered.[3]

The events subsequent to entry of this order have been the basis of this appeal. Beverly Tucker contends that she did not receive notice of the entry of this order until April 16, 1997. *See* Pet. at 4.[4] On April 17, 1997, acting *pro se*,

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3. In granting the motion, the Bankruptcy Court relied on *In re W.J. Servs., Inc.*, 139 B.R. 824, 827 (Bankr. S.D. Tex. 1992) for the proposition that the approval of a fee application amounts to a full and final litigation of the issues of the quality, reasonableness and necessity of work performed and that implicit in such an approval is a finding that no malpractice occurred.

4. Throughout this appeal, Ms. Tucker has stated that the Law Firm admits that she did not receive notice from the bankruptcy court clerk of the entry of summary judgment in time to initiate an appeal. The more accurate characterization of the Law Firm's (Cont'd)

Ms. Tucker filed a "Motion for Leave of Court to File Late Timely Appeal on Memorandum Opinion and Order Granting Defendants' Motion for Summary Judgment." This motion was denied by the Bankruptcy Court by order entered September 29, 1997.

Beverly Tucker then filed, on July 2, 1997, a "Motion for Court to Vacate Order Granting Summary Judgment." This motion was amended and refiled on or about January 23, 1998 after Ms. Tucker retained counsel. Following a hearing on March 16, 1998, the Bankruptcy Court denied Ms. Tucker's motion to vacate and an appeal ensued, leading to the filing of the Petition for Writ of Certiorari.

SUMMARY OF THE ARGUMENT

Ms. Tucker is unable to demonstrate that she is entitled to relief under Rule 60(b)(1) of the Federal Rules of Civil Procedure as her failure to receive notice of the entry of summary judgment against her did not result in the type of case disposition for which Rule 60(b) is intended to provide relief. Ms. Tucker also fails to demonstrate that she possesses a meritorious cause of action such that vacating the summary judgment would not be a futile exercise. Finally, the circumstances of Ms. Tucker's case are not so extraordinary as to justify relief under Rule 60(b)(6).

(Cont'd)
position is that it has always recognized that this was Ms. Tucker's *contention* and has proceeded on this assumption. As a practical matter, the Law Firm can neither admit or deny whether Ms. Tucker received such a notice because it is a fact over which the Law Firm has no control.

REASONS FOR DENYING THE WRIT

PETITIONER HAS FAILED TO DEMONSTRATE THAT THIS CASE INVOLVES CONSIDERATIONS JUSTIFYING REVIEW ON CERTIORARI.

To justify vacating the summary judgment order, Beverly Tucker must demonstrate the existence of one of the six grounds for relief set forth under Rule 60(b) of the Federal Rules of Civil Procedure, as adopted by Bankruptcy Rule 9024. These grounds are:

> (1) mistake, inadvertence, surprise, or excusable neglect;
>
> (2) newly discovered evidence which by due diligence could not have been discovered in time to move for anew trial under Rule 59(b);
>
> (3) fraud, misrepresentation, or other misconduct of an adverse party;
>
> (4) the judgment is void;
>
> (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; and
>
> (6) any other reason justifying relief from the operation of the judgment.

Throughout the course of this litigation, Ms. Tucker has stated her grounds for relief in terms of the circumstances described in subsections (1) and (6) of Rule 60(b), and this continues to be the case in the Petitioner's argument herein. *See* Pet. at 5. With respect to the grounds stated in Rule 60(b)(1), which are "mistake, inadvertence, surprise, or excusable neglect," Ms. Tucker asserts that her failure to file a timely appeal of the summary judgment order were due to circumstances beyond her control and thus, she is unquestionably entitled to relief under the "excusable neglect" element of Rule 60(b)(1).

When the purpose of Rule 60(b) is examined, however, Ms. Tucker's circumstances are not those that the Rule was intended to ameliorate. The courts of appeal that have addressed the issue have applied Rule 60(b) so as to avoid the dire consequences of defaults and dismissals.[5] It was in

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5. *See, e.g., Greater Baton Rouge Golf Ass'n v. Recreation and Park Comm'n for the Parish of East Baton Rouge*, 507 F.2d 227, 229 (5th Cir. 1975) (reversing trial court's denial of Rule 60(b) relief following dismissal with prejudice due to failure of plaintiff's counsel to appear at trial); *Spann v. Commissioners of the Dist. of Columbia*, 443 F.2d 715, 716 n.1 (D.C. Cir. 1970) (exercise of court's discretion in denying motion to revive and reinstate cause of action after agreed dismissal and collapsed settlement would be reviewed closely); *Tolson v. Hodge*, 411 F.2d 123, 130 (4th Cir. 1969) (Rule 60(b) is to be liberally construed in order to provide relief from onerous consequences of defaults and default judgments); *Leong v. Railroad Transfer Serv., Inc.*, 302 F.2d 555, 557 (7th Cir. 1962) (finding abuse of discretion where judge refused to vacate dismissal for want of prosecution where counsel for each party was under mistaken impression that court clerk would summon them to courtroom when case was to be called for trial); *Russell v. Cunningham*, 279 F.2d 797, 804 (9th Cir. 1960) (finding abuse of discretion where judge declined to vacate dismissal for want of prosecution).

fact a default judgment of denaturalization that was at issue in the *Klapprott* decision on which Petitioner relies. *See Klapprott v. United States,* 335 U.S. 601, 603, 69 S. Ct. 384, 385 (1949) (district court entered judgment by default in denaturalization proceedings and canceled certificate of naturalization).

Ms. Tucker's case did not involve a dismissal of her causes of action against the Law Firm. As set forth in the Statement of Facts above, the Law Firm filed a Motion for Summary Judgment in the Bankruptcy Court and Ms. Tucker filed more than one response. The matter came on for oral argument on November 25, 1996, and there is no dispute that Ms. Tucker was in attendance at this hearing. Therefore, this case is not one in which a pure technicality prevented consideration of Ms. Tucker's causes of action, but is a situation in which the litigant who received an unfavorable ruling is, predictably, disappointed and dissatisfied with the trial court's application of the law to the facts. The remedy for this dissatisfaction does not proceed from Rule 60(b), and the United States Court of Appeals for the Fifth Circuit correctly refused to apply Rule 60(b) so as to permit Ms. Tucker to "simply seek reconsideration of claims." *See* Pet. App. 3a.

Neither has Ms. Tucker been able demonstrate during the course of her appeal that she possesses a meritorious cause of action.[6] The failure to make such a showing was

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6. That a Rule 60(b) movant must make a showing of a meritorious claim or defense is a well-settled proposition among the courts of appeal. *See Murray v. District of Columbia*, 52 F.3d 353, 355 (D.C. Cir. 1995) (as precondition to Rule 60(b) relief, movant must provide court with reason to believe that vacating

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cited by the District Court, which noted in its order of January 12, 1999 that "[t]he Court finds the likelihood of success on the merits to be remote." *See* Pet. App. at 4a. The alleged merits of her causes of action against the Law Firm are addressed nowhere in the Petition for Writ of Certiorari.

Ms. Tucker also argues that she is entitled to relief under subsection (6) of Rule 60(b), which recognizes "any other reason justifying relief from the operation of the judgment." In this regard, Ms. Tucker cites this Court's decision in *Klapprott v. United States*, 335 U.S. 601, 69 S. Ct. 384 (1949) for the proposition that Rule 60(b) relief should be granted if the movant can demonstrate that the adverse judgment was entered because of circumstances beyond her control. Ms. Tucker's situation, however, is clearly incomparable to the circumstances of the denaturalized citizen in *Klapprott*, who was imprisoned, weakened by illness and without funds to

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judgment "will not be an empty exercise or a futile gesture"); *Pease v. Pakhoed Corp.*, 980 F.2d 995, 998 (5th Cir. 1993) (noting that bare and conclusory allegations of plaintiff's complaint failed to satisfy seminal requirement of meritorious claim or defense required for Rule 60(b) relief); *United States v. Timbers Preserve, Routt County, Colo.*, 999 F.2d 452, 454 (10th Cir. 1993) (Rule 60(b) movant must have meritorious defense, as well as good reason to set aside default); *Boyd v. Bulala*, 905 F.2d 764, 768 (4th Cir. 1990) (under all provisions of Rule 60(b), threshold condition for granting relief is that movant demonstrate that granting of relief will not in end have been futile gesture); *Beshear v. Weinzapfel*, 474 F.2d 127, 132 (7th Cir. 1973) (party moving for relief under Rule 60(b) must show facts which, if established, might reasonably be said to be basis of recovery); *Madsen v. Bumb*, 419 F.2d 4, 6 (9th Cir. 1969) (district judge did not abuse discretion in refusing to set aside default judgment when defendant failed to provide evidentiary support of substantial defense).

hire an attorney at the time of the default judgment in question. *Klapprott*, *supra*, 335 U.S. at 613-14, 69 S. Ct. at 390. Ms. Tucker's are not the extraordinary circumstances justifying application of subsection (6) of Rule 60(b).

CONCLUSION

The Petition for Writ of Certiorari reflects Petitioner's dissatisfaction with the lower courts' application of the law to the facts of her case and nothing more. As demonstrated above, the United States courts of appeals that have ruled on the issue, including the United States Court of Appeals for the Fifth Circuit which issued the decision below, are in accord in their interpretation and application of Rule 60(b). Furthermore, the decisions of the United States courts of appeal do not conflict with any decisions of this Court on the application of Rule 60(b). Petitioner's case does not place in issue any other possible circumstance justifying review by this Court.

For the foregoing reasons, Robert C. Wolter, Attorney, Debra J. Greer, Attorney, and the Law Firm of Wood, Boykin & Wolter, a Professional Corporation, respectfully request that this Court deny the Petition for Writ of Certiorari filed by Beverly Tucker.

Respectfully submitted,

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